

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of)
)
)

Distribution of 1998 and 1999)
Cable Royalty Funds)
_____)

Docket No. 2008-1 CRB CD 98-99
(Phase II)

**INDEPENDENT PRODUCERS GROUP'S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN CONNECTION
WITH THE 1998-1999 DEVOTIONAL PROGRAMMING CATEGORY**

Worldwide Subsidy Group LLC (a Texas limited liability company) dba Independent Producers Group ("IPG") hereby submits its "Proposed Findings of Fact and Conclusions of Law in connection with the 1998-1999 Devotional category, which are attached hereto.

Respectfully submitted,

Dated: September 23 2014



Brian D. Boydston, Esq.
California State Bar No. 155614

PICK & BOYDSTON, LLP
10786 Le Conte Ave.
Los Angeles, California 90024
Telephone: (213) 624-1996
Facsimile: (213) 624-9073
Email: brianb@ix.netcom.com

Attorneys for Independent Producers Group

TABLE OF CONTENTS

PROPOSED CONCLUSIONS OF LAW	2
PROPOSED FINDINGS OF FACT	6
I. <u>HISTORY OF PROCEEDINGS</u>	6
II. <u>IPG PROGRAMMING, THEORY OF COMPENSATION, DISTRIBUTION METHODOLOGY, AND RESULTS</u>	
A. IPG PROGRAMMING.....	6
B. IPG THEORY OF COMPENSATION.....	7
C. IPG DISTRIBUTION METHODOLOGY.....	8
i. Selection of Stations for Analysis; Acquisition of broadcast data; Use of 1997 Nielsen Data and Nielsen 2010/2011 Report for Daypart Viewing Analysis	8
ii. Submission of Materials to Navigant Economics.	11
iii. Review of All Program Titles and Logged Broadcasts; Identification of IPG-Claimed Broadcasts and SDC-Claimed Broadcasts	12
iv. Design of Dr. Robinson’s Methodology.....	12
D. COMPARISON OF IPG AND SDC PROGRAMMING ACCORDING TO A VARIETY OF INDICIA WARRANTS AN EQUAL SPLIT OF THE DEVOTIONAL ROYALTY POOL	13
INDICIA RELATED TO RETRANSMITTED BROADCASTS.	
i. Number of Distantly Retransmitted Broadcasts.....	13
ii. Number of Hours of Distantly Retransmitted Broadcasts.....	13
iii. Distant Subscribers Receiving Distantly Retransmitted Broadcasts. ...	14
iv. Time of Day of Distantly Retransmitted Broadcasts.....	14
INDICIA RELATED TO CABLE SYSTEMS RETRANSMITTING BROADCASTS.	

v. Fees Paid by Cable System Operators Retransmitting Broadcasts.	16
---	----

RELATIVE MARKET VALUE

vi. Relative Market Value.	17
vii. Sensitivity Analysis of Relative Market Value Share Estimates.	18
viii. Consistency with Prior Data of IPG and SDC, and Rulings of the CRB.	19

III. SDC CRITICISMS AGAINST THE IPG METHODOLOGY

A. IPG’S OMISSION OF SDC-CLAIMED BROADCASTS.	20
B. DR. ROBINSON’S MEASUREMENT OF VOLUME AS AN INDICIA OF RELATIVE VALUE.	21
C. DR. ROBINSON’S USE OF 1997 AND 1998 DAYPART VIEWING DATA, IN THE EVALUATION OF 1999 BROADCASTS.	22
D. THE SDC’S ATTEMPT TO INJECT THE SDC STUDY RESULTS AS A PURPORTED “RECALCULATION” OF DR. ROBINSON’S FIGURES.	24

IV. THE REBUTTAL AGAINST THE SDC STUDY

A. THE SDC STUDY LACKS SUFFICIENT FOUNDATION TO BE CONSIDERED OR, ALTERNATIVELY, NO WEIGHT CAN BE GIVEN TO SUCH STUDY.	24
i. IPG’S PENDING MOTION IN LIMINE TO EXCLUDE THE SDC STUDY.	24
ii. THE SDC’S INABILITY AND FAILURE TO PRODUCE THE “UNDERLYING DATA” OR THE “MERGER INFORMATION”, AND IPG’S INABILITY TO REPLICATE THE SDC STUDY.	25
iii. THE SDC’S INABILITY TO PRODUCE A WITNESS CAPABLE OF CONFIRMING THE BASIC CONTENTS OF NIELSEN DATA IN ITS POSSESSION AND UPON WHICH IT PURPORTS TO HAVE RELIED.	26
1. DISTANT vs. LOCAL DATA; DIARY vs. METER DATA; REGRESSION ANALYSES; INTERPOLATIONS.	27

2. STATIONS SELECTED FOR INCLUSION.....	28
iv. THE SDC STUDY WAS NOT DESIGNED BY AN SDC WITNESS, NOR WAS THE “UNDERLYING DATA” OR THE “MERGER INFORMATION” REVIEWED BY SDC EXPERT WITNESS JOHN SANDERS. JOHN SANDERS LACKS SUFFICIENT INFORMATION TO OPINE ON THE SDC DATA.....	30
B. THE SDC STUDY INCORRECTLY ASSUMES THAT NIELSEN-MEASURED HOUSEHOLD VIEWING EQUATES TO THE MEASURE OF “VALUE” FOR ANY PROGRAM RETRANSMITTED BY A CABLE SYSTEM.....	32
i. NO EVIDENCE EXISTS THAT VIEWING EQUATES TO INCREASED CABLE SYSTEM SUBSCRIBERSHIP	32
ii. ONLY “MARGINAL VIEWING” COULD RESULT IN INCREASED SUBSCRIBERSHIP, BUT IS NOT CALCULATED BY THE SDC STUDY	35
iii. ONLY VIEWING KNOWN IN ADVANCE OF A CABLE SYSTEM OPERATOR’S DECISION TO RETRANSMIT A STATION COULD AFFECT A CSO’S DECISIONMAKING, BUT IS NOT CONSIDERED BY THE SDC STUDY	36
C. THE SDC STUDY, AS PURPORTED, DEPENDS UPON STATISTICALLY UNRELIABLE DATA, UNSUBSTANTIATED PROJECTIONS OF HOUSEHOLD VIEWING, AND AN INADEQUATE NUMBER OF MEASURED BROADCASTS	36
i. THE SDC STUDY, AS PURPORTED, DOES NOT MEASURE VIEWERS BUT “PROJECTS” VIEWERSHIP.....	36
ii. THE SDC STUDY, AS PURPORTED, ONLY MEASURES 1999 “SWEEPS” BROADCASTS FOR 24 OF 52 WEEKS, ON DATA FOR ONLY 72 STATIONS, THEN EXPERIENCES EXTRAORDINARILY HIGH AND ERRATIC INSTANCES OF “ZERO VIEWING”.....	37
D. THE SDC VIEWER STUDY IS STATISTICALLY FLAWED AND WITHOUT ANY RATIONAL JUSTIFICATION BECAUSE OF THE PREVALENCE OF “ZERO VIEWING”.....	37
i. “Zero” Viewer Analysis of Nielsen Quarter Hour Data for All Measured Broadcasts, Devotional Broadcasts, IPG, and SDC	37

ii.	The SDC has made no attempt to reduce or account for the high and disparate levels of “Zero Viewing”.....	39
iii.	“Zero Viewing” Analysis on a Program Title by Station Basis.....	42
iv.	“Zero Viewing” on a Program-by-Program basis.....	43
v.	The SDC has offered no qualified witness for its summary conclusion that the “zero viewing” percentages are not problematic.....	45
vi.	The corruption of a necessary and significant element of the SDC study corrupts any results derived from the SDC study.....	46
E.	THE SDC COULD HAVE IMPROVED ITS DATA WITH REGRESSION ANALYSIS, INTERPOLATIONS, AND OTHER MEANS UTILIZED IN PRIOR PROCEEDINGS IN ORDER TO ATTRIBUTE VALUE TO NON-SWEEPS BROADCASTS AND BROADCASTS WITH “ZERO VIEWING” INSTANCES.....	47
F.	THE SDC’S ASSERTED CORRELATION BETWEEN “LOCAL” AND “DISTANT” VIEWING IS BASED ON ONLY A HANDFUL OF DEVOTIONAL PROGRAMS, AND THEIR “LOCAL” RATINGS FOR FOUR WEEKS IN FEBRUARY 1999, PURPORTS TO PROJECT THE CORRELATION TO THOUSANDS OF PROGRAMS AND MILLIONS OF BROADCASTS APPEARING IN THE NIELSEN DATA, AND DEMONSTRATES THAT IPG PROGRAMMING HAS A RELATIVE VALUE SIGNIFICANTLY HIGHER THAN ITS DISTANT RATINGS.....	48
G.	THE SDC STUDY, AS PURPORTED, RELIES ON A STATISTICALLY INADEQUATE NUMBER OF STATIONS, THEREBY UNNECESSARILY EXCLUDING ENTITLED BROADCASTS FROM COMPENSATION IN THESE PROCEEDINGS.....	50
H.	THE 1998-1999 SDC STUDY, EVEN AS PURPORTED, IS INFERIOR IN STATED DESIGN TO THE MPAA VIEWER STUDY THAT WAS ALREADY FOUND UNRELIABLE IN THE 1997 CABLE DISTRIBUTION PROCEEDINGS.....	51

PROPOSED CONCLUSIONS OF LAW

1. The IPG methodology presents an unbiased analysis for the distribution of Phase II Devotional programming royalties that seeks to include as many qualified broadcasts as is economically feasible. The number of surveyed stations, while not comprehensive of all broadcasts qualifying for distribution of cable retransmission royalties, includes a substantial percentage of broadcasts generating the royalties at issue in this proceeding, and is a sufficiently representative sample of the aggregate of retransmitted stations. *See* sections I., II., *infra*.

2. The IPG methodology seeks to replicate the decisions actually made by cable system operators by looking at data representative of such decisions, and data reflecting the aggregate of information that a cable system operator could have had at the time of its decision to retransmit a broadcast station. *See* sections I., II., *infra*.

3. The SDC's criticisms of the IPG methodology are either unsupported by the facts, are accepted by IPG and incorporated into IPG's submitted results, or are explained by IPG. In all such circumstances, the significance (if any) of all such criticisms have not been quantified by the SDC. *See* section III., *infra*.

4. The SDC and its representatives did not design a distribution methodology. The SDC's asserted results are based on data acquired from third parties (e.g., Nielsen) that did not appear as witnesses or submit information in order to explain such data. No SDC witness had firsthand familiarity with the data upon which the SDC relied, and no SDC witness could attest to the contents thereof. The SDC did not retain or produce data and information underlying the SDC study, as required by CRB regulation 37 C.F.R. Section 351.10(e), and thereby precluded IPG from replicating the SDC results or examining the underlying data and processes, as

required pursuant to prior CRB rulings.¹ On such grounds the SDC study and results and any information from which such study and results was derived, could be excluded from evidentiary consideration pursuant to IPG's pending motion in limine. The SDC study, even if considered, lacks sufficient foundation to be accorded any weight, because of the SDC's inability and failure to produce a witness capable of confirming the basic contents of data from which the SDC study was derived. *See* section IV., *infra*.

5. No SDC witness could attest to the contents of the Nielsen data. No SDC witness could reasonably confirm whether the Nielsen data utilized diary data, meter data, or a combination thereof. No SDC witness could attest to the methods of data collection, processes followed, or standards and parameters reflected by the Nielsen data. *See*. Section IV.A.iii., *infra*.

6. The SDC study sampled stations on a basis that is unknown. The SDC asserts that the sampled stations were selected by MPAA employee Marsha Kessler, a non-expert. The SDC submitted documents in discovery indicating a basis for station selection by Marsha Kessler that was disproved by evidence. No SDC witness can attest to any basis for the selection of stations appearing in the Nielsen data, or the stations culled down therefrom to create the SDC 72-station study. In order to make statistically valid inferences and generalizations from a sample there must be evidence that the sample is representative of the population from which it is drawn, and the SDC is unable to provide such evidence. *See* Section IV.A.iii., *infra*.

7. According to the testimony of SDC witnesses, the SDC study attempts to measure the household viewing of programs. Multiple prior rulings of the CRT, CARP, and CRB have held that the appropriate consumer for purposes of allocating value between a willing buyer and

¹ "All bottom line figures must be verified, and all parties must be prepared to share all of the underlying data that contributed to those bottom-line figures." Order in Docket no. 94-3 CARP CD 90-92 at 2 (October 30, 1995); Order in Docket no. 2008-2 CRB CD 2000-2003 (Phase II) (October 24, 2012).

willing seller of retransmitted programming, is the cable system operator. Consequently, even if accurately measured, any study assessing the appeal of programming to a household consumer measures the wrong characteristic. *See* section IV.B., *infra*.

8. The Nielsen data upon which the SDC study relies does not actually measure viewership, but “projects” viewership. The Nielsen data upon which the SDC study relies only purports to measure “sweeps” broadcasts for 24 of 52 weeks during 1999. The Nielsen data upon which the SDC study relies was culled down from broadcast data for 123 stations to 72 stations, without explanation, only speculation. Even though the SDC has not provided Nielsen data on the number of households and the locations of those households in the Nielsen data, information required to be produced in prior cable distribution proceedings, IPG has reviewed the raw Nielsen data and determined that the prevalence of unmeasured viewing in the Nielsen data deems the Nielsen data unreliable for purposes of the SDC study. The Nielsen data upon which the SDC study relies is so flawed, and so unreliable, that the Judges cannot use it to make any allocation in this proceeding. *See* sections IV.C. and D., *infra*.

9. The prevalence of “zero viewing” in the Nielsen data is so profound, so dramatically varying from station to station, and results in the attribution of zero viewing to such a significant percentage of the unique programs measured thereby, that the only reasonable conclusion is that such data is unreliable. The Nielsen data necessarily affects each and every attribution of value in the SDC study, and necessarily renders the SDC study unreliable as to each and every attribution of value. *See* section IV.D., *infra*.

10. The SDC made no attempt to improve its data with regression analysis, interpolations, and other means utilized in prior proceedings in order to attribute value to non-

sweeps broadcasts and broadcasts with “zero viewing” instances, even though doing so would not have required acquiring local ratings data or other forms of data. *See* section IV.E., *infra*.

11. The SDC’s asserted correlation between “local” and “distant” viewing is based on only a handful of devotional programs and their “local” ratings for four weeks in February 1999, and purports to project the correlation to thousands of programs and millions of broadcasts appearing in the Nielsen data. The asserted correlation is not statistically significant, is not valid, and demonstrates that IPG programming has a relative value significantly higher than its distant ratings. *See* Section IV.F., *infra*.

12. The Nielsen data and the SDC study rely on a statistically inadequate number of stations, as determined in prior CRT proceedings.. *See* section IV.G, *infra*.

13. The Nielsen data upon which the 1999 SDC study exclusively relies for its results is only a portion of the data presented by the MPAA and deemed unreliable in the 1997 cable distribution proceedings. The 1999 SDC study, as a matter of law, is therefore inferior to the 1997 MPAA study and, as a matter of law, unreliable. *See* section IV.H., *infra*.

14. The Judges adopt the recalculated figures presented by Dr. Robinson in Exh. IPG-D-016 as to the allocation of relative value between IPG and the SDC according to a variety of indicia, thereby warranting an equal split of the 1999 Devotional programming royalties between IPG and the SDC.

PROPOSED FINDINGS OF FACT

I. HISTORY OF PROCEEDINGS.

On or about February 28, 2008, IPG filed its Notice of Intent to Participate in Phase II distribution proceedings relating to the Devotional Programming category. On July 25, 2013, the Copyright Royalty Judges issued their Order Setting Deadline for Filing Written Direct Statements, Announcing Discovery Period, and Requiring Settlement Conference. Such order details the history of these proceedings, which are currently limited to consideration of the Phase II distribution of 1999 cable royalties in the Devotional Programming category.

In connection with its Amended Written Direct Statement (hereafter “WDS”), IPG indicated its representation of six (6) producers and distributors in the Devotional Programming category. IPG WDS at 6; see Ex. IPG-1 to WDS (RG test.). Following a preliminary hearing regarding claims, two of IPG’s represented claimants - - Feed the Children, Inc. and Adventist Media Center - - were dismissed from the Devotional category. Order of June 18, 2014.

II. IPG PROGRAMMING, THEORY OF COMPENSATION, DISTRIBUTION METHODOLOGY, AND RESULTS.

A. IPG PROGRAMMING.

IPG originally identified 14 distinctly titled programs and 12,017 broadcasts within its catalogue that were broadcast on stations generating substantial cable retransmission royalties during the 1999 calendar year. Following the exchange of discovery materials and the Order of June 18, 2014, IPG identified 10 distinctly titled IPG-represented programs (the “Programs”) and 11,041 broadcasts within its data, and 20 distinctly titled SDC-represented programs and 6,684 broadcasts within IPG’s data. IPG-D-002, IPG-D-003, IPG-D-005, IPG-D-012. A single program may appear in acquired data under a variety of names. *Id.* IPG’s identification of SDC programs and broadcasts *includes* 126 broadcasts that the SDC maintained had not been

originally included in IPG's analysis. *Id.* Each of the Programs is either owned or controlled by entities that have assigned IPG the right to collect cable retransmission royalties attributable to their programming. IPG WDS at 11; see Exs. IPG-1, IPG-2 to WDS (RG test.); IPG-D-002, IPG-D-003.

B. IPG THEORY OF COMPENSATION.

IPG espouses that each and every broadcast of a program by a terrestrial station, that is thereafter retransmitted by a cable system operator ("CSO") pursuant to the compulsory licensing provisions of 17 U.S.C. Section 111, is entitled some portion of the fees collected by the U.S. Copyright Office. IPG espouses that all broadcasts for which the owner has been deprived the right to license to a CSO is entitled some portion of the retransmitted broadcasts. IPG WDS at 8.

The IPG methodology seeks to replicate the decisions actually made by CSOs by looking at data representative of such decisions, and data reflecting the aggregate of information that a CSO could have had at the time of its decision to retransmit a broadcast station. The criteria for distribution of a Phase II award to a retransmitted broadcast is "relative marketplace value", however the issue remains how to define such criteria, and what information to consider in connection therewith. Certain restrictions exist in the compulsory licensing scheme that would not otherwise exist in a negotiated license between a producer and an exhibitor, e.g., requirement that a cable system retransmit a broadcast signal *en toto*, and therefore affect the royalties that are paid by the cable systems retransmitting a broadcast. IPG WDS at 7.

According to IPG, once there has been a determination as to which Phase I category a program should go into, then broadcasts of all programs within such category should arguably be allocated royalties based only on those factors that distinguish them within a single, integrated

broadcast of a station, and are known in advance of the retransmitted broadcast - - no differently than an advance negotiated license between a copyright owner and an exhibitor. Consequently, the only factors that would be considered for distributing royalties to a particular program in Phase II are the factors of (i) which station(s) a program appeared on (which, in turn, allows for a determination as to the number of subscribers receiving the retransmitted signal, and what fees were collected from the station's retransmission), (ii) the number of times that the program was broadcast on such station, and (iii) the length of the program broadcasts. Factors such as the unknown, after-the-fact determined viewership of the program would be of no relevance, since the compulsory license fee paid by the CSO is paid in advance of, and regardless of, any such determinations of viewership or ratings. IPG WDS at 7.

Notwithstanding, and according to IPG, if the goal is to replicate what would occur in the free market in the absence of a compulsory license, as opposed to what has actually occurred (i.e., a statutory compulsory license rate that ignores free market factors as part of the CSO's royalty obligation), then the Judges need to additionally focus on such factors as the CSO could have known prior to entering into any negotiated license with a program owner, such as the *anticipated* viewership of the program, as reflected by the time period during which a program was broadcast (e.g., 8:00 pm versus 2:00 am). IPG WDS at 8.

C. IPG DISTRIBUTION METHODOLOGY.

i. Selection of Stations for Analysis; Acquisition of Broadcast Data; Use of 1997 Nielsen Data and Nielsen 2010/2011 Report for Daypart Viewing Analysis.

IPG previously obtained updated data from Cable Data Corporation of the 200 television stations that were most significantly retransmitted by Form 3 cable systems during 1999. Tr. at

978-981 (RG). During 1999, there were fewer than 700 distantly retransmitted television stations. Tr. at 978-979 (RG).

The CDC data includes information about more than 2,700 CSOs and indicates information, *inter alia*, on stations retransmitted, distant retransmission fees, and the number of distant subscribers. For each station, the CDC data indicates the number of CSOs retransmitting the stations, the average distant retransmission fees paid by the CSOs retransmitting the station, the average number of distant subscribers to the cable system retransmitting the station, the distant retransmission fees paid by the CSOs to retransmit the station, and the distant subscribers to the cable systems retransmitting the station. The total distant retransmission fees paid by the CSOs in the CDC data sums to approximately eighty million dollars. WDS at 21 (LR).

IPG acquired CDC data on the top 200 television stations with an eye toward prior rulings of the Copyright Royalty Tribunal as to the sufficient number of stations that must be included in a study. Specifically, in the 1983 CRT determination, the CRT found that the MPAA study of 117 stations out of 622 (18.8%) was inadequate for the purpose of sampling in these distribution proceedings, a fact that was even conceded by the MPAA. 51 Fed. Reg. 12792, 12794 (Apr. 15, 1986). Consequently, in order to increase such percentage to levels that had not been criticized in subsequent distribution proceedings, IPG acquired CDC data on no less than 28.5% of the most distantly retransmitted stations (200/700). Tr. at 979-980 (RG). As of the date of IPG's data acquisition, no criticism had been made by the CRT or its successors that the stations were not selected by random sample, as opposed to being selected according to their size, and such issue did not arise until the 2000-2003 cable proceedings (Phase II). Tr. at 982 (RG).

IPG thereafter acquired from Tribune Media (fka TV Data Corporation) the broadcast data for all 134 commercial broadcast stations within such list of 200 stations. Tr. at 981-982 (RG). Broadcast data for non-commercial stations was not acquired because of its irrelevance to these and other proceedings with which IPG was involved. The information from Tribune Media includes broadcast data on program titles claimed by IPG and the SDC during 1999 and distantly retransmitted by CSOs. WDS at 21 (LR). The information in this database includes, *inter alia*, the date and time the broadcast was aired (to the minute), the station call sign, the program length (in minutes), the program type, and the program title. WDS at 21 (LR). Over 1.5 Million logged broadcasts appeared in the Tribune Media data. Tr. at 981 (RG).

The 134 commercial stations selected by IPG accounted for no less than **70%** of the aggregate amount of fees generated and paid by *all* CSOs during 1999, according to an allocation methodology authored by Cable Data Corporation. WDS at P. 26, fn. 12; Tr. at 153-159 (LR). The “Fees Generated” figure calculated on a station-by-station basis by Cable Data Corporation is according to an allocation methodology that was previously considered and adopted by the Copyright Royalty Board in the 2000-2003 cable proceedings (Phase I). Tr. at 985-986 (RG); 75 Fed. Reg. 26798 (May 12, 2010). Although initially criticizing such allocation methodology, SDC witness Dr. Erdem subsequently testified he had no problem with the estimation of value therefrom. Tr. at 1107 (Erdem). No figure was available as to what percentage the 134 commercial stations represented of the aggregate fees paid for only commercial stations, or what percentage the 200 commercial/non-commercial stations were of the aggregate fees generated and paid by all CSOs. Tr. at 987-991 (RG).

IPG additionally had in its possession two forms of Nielsen data. First, the Nielsen Media Research data produced by the MPAA in the 1997 cable proceedings (Phase II), reflecting

distant viewing projections during 1997 for 102 sampled stations. Such data from Nielsen Media Research is segregable according to the time period of the measured broadcast, an indicator relevant to determining relative market value. WDS at 22 (LR). Second, IPG obtained the Nielsen Television Audience Report, 2010 and 2011, which document is generally available online, and summarizes daypart viewing in the United States over several decades. Tr. at 977, 984-985 (RG); WDS at 20, 22 (LR).

ii. Submission of Materials to Navigant Economics.

Dr. Laura Robinson is a Managing Director at Navigant Economics, and an expert in statistics and economics. Dr. Robinson has rendered her expert analysis in a wide array of matters, including several matters involving the valuation of intellectual property. IPG-D-004; Tr. at 70-72, 87 (LR). Dr. Robinson previously familiarized herself with the cable distribution proceedings when she appeared as a rebuttal witness in connection with the 2000-2003 cable proceedings (Phase II). IPG engaged Navigant Economics and Dr. Robinson in order to analyze the relative market value of IPG and SDC programming in connection with these proceedings. WDS at 14.

Upon IPG's engagement of Navigant Economics, IPG supplied Dr. Laura Robinson with all of the data previously obtained by IPG. Specifically, IPG provided Dr. Robinson with four items of data pertinent to 1999: (i) the Cable Data Corporation data relating to the 200 most significantly retransmitted stations, and comprising data from over 2,700 CSOs, (ii) the Tribune Media data for the 134 commercial stations identified in the Cable Data Corporation data, (iii) Nielsen Media Research data produced by the MPAA in the 1997 cable proceedings (Phase II), and (iv) the Nielsen Television Audience Report, 2010 and 2011. Tr. at 125 (LR); Tr. at 976-977 (RG).

IPG gave no instructions to Navigant Economics or Dr. Robinson other than to review the prior opinions of the CRB and its predecessors, and to devise a methodology that adequately allocated “relative market value” to the IPG-claimed and SDC-claimed programming. Tr. at 109 (LR); Tr. at 987, 997-998 (RG).

iii. Review of All Program Titles and Logged Broadcasts; Identification of IPG-Claimed and SDC-Claimed Broadcasts.

Upon obtaining the 1999 broadcast data for the selected stations, Dr. Robinson reviewed the programs broadcast on such stations during their entire 24-hour time frame, for the entirety of the surveyed year. Such Tribune Media data originally consisted of over **1.5 Million** logged broadcasts. Tr. at 981 (RG). Following the exchange of discovery materials and the Order of June 18, 2014, Dr. Robinson identified **17,725** broadcasts of IPG-represented programs and SDC-represented programs (**11,041** IPG broadcasts; **6,684** SDC broadcasts) within IPG’s data. IPG-D-012.

iv. Design of Dr. Robinson’s Methodology.

According to Dr. Robinson, analysis of the market value of retransmitted broadcasts benefits from an examination of a hypothetical negotiation between a willing buyer (a CSO) and a willing seller (copyright owner). The economic theory of bargaining indicates that it is necessary to consider marginal costs and benefits to the parties. The marginal costs and benefits faced by CSOs is complex, in part due to the fact that CSOs are statutorily required to retransmit a station in its entirety, and due to the fact that copyrighted programs being provided to subscribers are bundled. WDS at 16.

Dr. Robinson does not have information regarding the marginal benefits and marginal costs faced by the CSOs retransmitting the broadcasts at issue in these proceedings. However, various indicia of the economic value of the retransmitted broadcasts exist in obtainable data,

including the length of the retransmitted broadcasts, the time of day of the retransmitted broadcast, the number of persons distanty subscribing the station broadcasting the IPG-claimed program, and the fees paid by CSOs to retransmit the stations carrying the broadcasts. WDS at 17. According to Dr. Robinson, one of the ways in which an analysis of relative market value can be distinguished from the analysis of market value is that it does not require estimating factors that are common among the parties. WDS at 18.

D. COMPARISON OF IPG AND SDC PROGRAMMING ACCORDING TO A VARIETY OF INDICIA WARRANTS AN EQUAL SPLIT OF THE DEVOTIONAL ROYALTY POOL.

INDICIA DIRECTLY RELATED TO RETRANSMITTED BROADCASTS

i. Number of Distantly Retransmitted Broadcasts.

A comparison of the number of distantly retransmitted broadcasts reveals that IPG-represented programs account for 11,041 broadcasts (62.3%) and SDC-represented programs account for 6,684 broadcasts (37.7%), of the broadcasts compensable in these proceedings and appearing in the IPG data. WDS at 26-29; Tr. at 90-91 (LR); IPG-D-012.

ii. Number of Hours of Distantly Retransmitted Broadcasts.

A comparison of the number of hours of distantly retransmitted broadcasts reveals that IPG-represented programs account for 5,521 hours of broadcasts (48.2%) and SDC-represented programs account for 5,931 hours of broadcasts (51.8%), of the broadcasts compensable in these proceedings and appearing in the IPG data. WDS at 26-29; Tr. at 90-91 (LR); IPG-D-012; IPG-D-013. The volume of retransmitted programming by itself would not be a sufficient metric, but in conjunction with other metrics going toward the value of a retransmitted program, volume would not just be relevant, but important to the relative market value of such programming. Tr. at 165 (LR).

iii. Distant Subscribers Receiving Distantly Retransmitted Broadcasts.

Dr. Robinson also analyzed the number of subscribers receiving distantly retransmitted broadcasts, and how that varies across IPG and SDC broadcast quarter hours. IPG-D-010 illustrates the distribution of the IPG and SDC broadcasts by the number of distant subscribers receiving the distantly retransmitted broadcasts. Inspection of IPG-D-010 shows that the IPG and SDC distantly retransmitted broadcasts are similarly distributed with some categories reflecting more IPG broadcasts and some categories reflecting more SDC broadcasts. WDS at 32-34; Tr. at 139-141 (LR); IPG-D-010.

Notwithstanding, Dr. Robinson further analyzed the distant-subscriber-to-CSOs metric by computing a weighted average of distant subscribers, i.e., by dividing the number of distant subscribers to whom CSOs were retransmitting such broadcasts by the number of quarter-hour broadcasts, on a quarter hour basis and collectively. Distant subscribers weighted by IPG broadcast quarter hours reflect an average of 19,821 distant subscribers while distant subscribers weighted by SDC broadcast quarter hours reflect an average of 18,320 distant subscribers. IPG-D-011. IPG broadcasts have been distantly retransmitted to 52% of the recipients of qualifying devotional programming, and SDC broadcasts have been distantly retransmitted to 48% of the recipients of such programming. IPG-D-013. To the extent that the value of the broadcasts relates to the number of distant subscribers receiving the broadcasts, this metric indicates that IPG distantly retransmitted broadcasts have more value than SDC distantly retransmitted broadcasts. WDS at 33-34; IPG-D-013.

iv. Time of Day of Distantly Retransmitted Broadcasts.

SDC witness John Sanders has testified “I concluded there was no meaningful difference in the time of day when the subject programs were telecast.” SDC WDS at 7-8 (Sanders test.).

Comparably, when Dr. Robinson attributed daypart viewing figures against the IPG-claimed and SDC-claimed broadcast periods, Dr. Robinson concluded that, of the measured broadcast periods, IPG-represented programs were broadcast when 46% of the U.S. viewers watch television, and SDC-represented programs were broadcast when 54% of the U.S. viewers watch television. To the extent that the value of the broadcasts relates to anticipated viewership of the broadcasts according to the time of day, this metric indicates that IPG-represented programs retain a relative market value “roughly similar” to that of SDC-represented programs. WDS at 29-31; Tr. at 93-94, 119-120 (LR); IPG-D-006; IPG-D-007.

Dr. Robinson conducted her daypart viewing analysis by relying on 1997 and 1998 Nielsen distant viewing data produced by the MPAA in prior cable proceedings. Tr. at 184 (LR). According to Dr. Robinson, because the data is so aggregated, unless there were very large changes in the viewing patterns over the course of the day, there would be no difference between daypart viewing patterns in 1999 than in 1997/1998. Tr. at 186 (LR). Dr. Robinson further confirmed via publicly available Nielsen Media Research publications (Nielsen Audience Report, 2010/2011) that there have been only trace changes in U.S. daypart viewing, even over the span of decades. According to the Nielsen Audience Report, 2010/2011, from 1995 to 2000 the only daypart viewing change was a movement of 1% of aggregate viewing in three categories. Tr. at 185-189 (LR); Tr. at 984-985 (RG).

Dr. Robinson indicated that as of the time of her analysis, she did not have 1999 Nielsen data. Tr. at 185-186 (LR). Additionally, the Nielsen data submitted by the SDC in these proceedings was lacking foundation as to all aspects thereof and, consequently, could not be considered a reliable and valid substitute for 1997/1998 Nielsen data in IPG’s possession.

Additionally, as an indicator of 1999 anticipated daypart viewing, the only data available to a CSO would be already-existing information, e.g., 1997/1998 data.

Notwithstanding her use of Nielsen viewership data, Dr. Robinson expressed her understanding that a prior ruling of the Librarian of Congress, in 1998-1999 Phase I proceedings held that household viewership is the “wrong thing” to measure for allocating cable retransmission royalties. *Distribution of 1998 and 1999 Cable Royalty Funds*, 69 Fed. Reg. 3606, 3613 (Jan. 26, 2004). Dr. Robinson also expressed her understanding that the SDC witness, Mr. Sanders, concluded that “there was no meaningful difference in the time of day, when the subject programs [claimed by IPG and the Non-IPG Claimants] were broadcast.” Nevertheless, Dr. Robinson presented her time-of-day viewership analysis to the extent the Judges may consider it as an indicator of market value, but did not opine on the weighting of such indicator, compared to the weighting of other identified indicia. WDS at 31 (LR).

INDICIA RELATED TO CABLE SYSTEMS RETRANSMITTING BROADCASTS

v. Fees Paid by Cable System Operators Retransmitting Broadcasts.

CSOs pay for the rights to retransmit stations broadcasting the IPG-claimed and SDC-claimed programs. The amount of fees being generated by CSOs retransmitting stations with IPG/SDC programming speaks to the fees being generated by such broadcasts, and is therefore relevant. Tr. at 177 (LR). By combining the CDC data on fees paid by station and the Tribune Media data on broadcast quarter hours by station, Dr. Robinson analyzed the distribution of IPG and SDC broadcast quarter hours by such fees paid. WDS at 31-32 (LR); IPG-D-008. The original results illustrated that, on average, IPG broadcast quarter hours are shown on stations that are retransmitted by CSOs who pay relatively more in distant retransmission fees than SDC broadcasts. WDS at 31-32 (LR); Tr. at 133 (LR). After recalculating such figures at the request

of the Judges and in order to attribute a precise entry for such metric (including \$53 Million in attributed fees for SDC broadcasts on WGN), the distant-retransmission-fees-paid-by-CSOs metric indicates that the CSOs retransmitting IPG broadcasts still represent 41% of the value compared to CSOs retransmitting the SDC broadcasts. WDS at 31-32; IPG-D-008. Such metric reflects the characteristic of CSOs retransmitting IPG/SDC broadcasts, e.g., whether they are large or small, as an analysis about the relative bargaining power of the CSO in the hypothetical negotiation. Tr. at 94, 100 (LR).

Dr. Robinson further analyzes the distant-retransmission-fees-paid-by-CSOs metric by matching every SDC quarter hour broadcast with an IPG quarter hour broadcast. WDS at 31-32 (LR); IPG-D-009. IPG-D-009 shows that every SDC broadcast quarter-hour can be matched with an IPG broadcast quarter hour in the same or higher group. This provides strong evidence, that by this metric, there is no significant distinction between CSOs carrying IPG-claimed programming and SDC-claimed programming. Tr. at 134 (LR).

RELATIVE MARKET VALUE

vi. Relative Market Value.

Dr. Robinson analyzed five indicia of relative market value. Four are directly related to the broadcasts claimed by IPG and the SDC, while one is indirectly related by comparing a characteristic of the CSOs retransmitting broadcasts claimed by IPG and the SDC. WDS at 36 (LR); IPG-D-013. The more indicia of relative market value as are considered and result in the same outcome, the more comfort exists that the outcome is valid. Tr. at 102-103 (LR)

The results of such analysis appear in IPG-D-012 and IPG-D-013. For the two indicia directly related to the broadcasts claimed by IPG and the SDC, and for which Dr. Robinson considers most related to relative market value, the relative market value attributed to IPG ranges

from 48% to 52%. IPG-D-016. For the indicator reflecting daypart viewing, if relevant to the Judges, it reflects a relative market value of 46% for IPG, however the SDC has itself concluded that “there was no meaningful difference in the time of day when the subject programs were telecast.” SDC WDS at 7-8 (Sanders test.). For the indicator indirectly related to the relative market value by a comparison of a characteristic of CSOs retransmitting IPG and SDC broadcasts, the reflected values show that there is no significant distinction between CSOs carrying IPG-claimed programming and SDC-claimed programming. Tr. at 188 (LR). Dr. Robinson’s conclusions are based on direct evidence that the volume of IPG/SDC programming is of equal size, that CSOs paid fees for stations carrying IPG/SDC programming in equal measure, that CSOs exposed IPG/SDC programming to subscribers in equal measure, and that there was no meaningful difference between the time of day of IPG/SDC programming. Dr. Robinson testified that the data in her possession was the best data available, in her professional opinion. Tr. at 102-103 (LR). In light of the comparable characteristics of IPG and SDC programming across all such indicia relevant to relative market value and for which data is reasonably available, and the comparable characteristics of CSOs distantly retransmitting IPG and SDC programming, an equal split of the devotional royalty pool is warranted. Tr.at 166, 187-188 (LR).

vii. Sensitivity Analysis of Relative Market Value Share Estimates

Dr. Robinson’s analysis relies on information from Tribune Media including broadcast data on program titles for stations retransmitted by more than 2,700 CSOs who collectively paid more than \$80 million in distant retransmission fees. With retransmission fees for all CSOs summing to \$113 million in 1999, the CSOs in Dr. Robinson’s sample reflect more than 70% of the distant retransmission fee generated. *See* website for the U.S. Copyright Office, Licensing

Division at <http://www.copyright.gov/licensing/lic-receipts.pdf>. Dr. Robinson engaged in a sensitivity analysis in order to examine the impact of not having data on the remaining CSOs and not having the corresponding Tribune Media data on the claimed titles broadcast by the stations retransmitted by such CSOs. Tr. at 153-158 (LR).

If the missing data has similar characteristics to the data analyzed, then there will be no significant impact to Dr. Robinson's results. However, in the scenario least favorable to IPG all of the missing data would reflect broadcast quarter hours for SDC titles and in the scenario most favorable to IPG all the missing data would reflect broadcast quarter hours for IPG titles. IPG-D-014 shows the impact of considering the least favorable and most favorable scenarios on the relative market value share estimates and shows that the IPG relative market share value ranges from 37% to 66% (for indicia related to broadcasts), in the extreme cases in which all missing data benefits the SDC claimants on the one hand, or IPG on the other. IPG-D-014. Such figures reflect a "floor" and a "ceiling" on the relative value and award to IPG. Tr. at 153-158 (LR). The sensitivity analysis for "fees paid by CSOs" reflects a "floor" and "ceiling" relating to the characteristic of fees paid by CSOs carrying IPG programming and SDC programming, and ranges from 29% to 58% (for an indicator related to CSOs). IPG-D-014.

viii. Consistency with Prior Data of IPG and SDC, and Rulings of the CRB.

In the 2000-2003 cable proceedings (Phase II), IPG and the SDC advocated similar results for the distribution of devotional programming fees for calendar year 2000, i.e., the year immediately following the calendar year at issue herein. In those proceedings, IPG advocated that IPG receive 37.14% of the 2000 devotional cable pool, while the SDC advocated that IPG receive within a range as high as 39.1% of the devotional cable pool. 78 Fed. Reg. 64984, 65004

(Oct. 30, 2013). Based on the similarity of claim, the Judges awarded IPG 37.14% of the 2000 devotional cable pool.

IPG's represented claimants for 1999 are indistinguishable from the IPG-represented parties for 2000. By contrast, the SDC-represented claimants for 1999 contain fifteen (15) fewer claimants than for 2000. *Cf.* SDC WDS, Exh. 2, in 2000-2003 cable proceedings. Consequently, IPG's assertion of a claim for half of the 1999 devotional cable pool is consistent with the value of IPG's 2000 claims according to both IPG and the SDC. Correspondingly, the SDC's assertion that IPG's 1999 claim is valued at only 18.5% is significantly inconsistent with the much higher figure accorded to IPG by the SDC for 2000, when IPG represented a significantly smaller percentage of the devotional claimants.

III. SDC CRITICISMS AGAINST THE IPG METHODOLOGY.

A. IPG'S OMISSION OF SDC-CLAIMED BROADCASTS, AND INCLUSION OF DISMISSED PROGRAMMING.

The SDC rebuttal brief notes that Dr. Robinson's analysis appearing in IPG's Amended Direct Statement omitted 126 broadcasts of SDC-claimed programming due to filtering any programming that was not identified by devotional program type code "27". The SDC rebuttal brief additionally noted that Dr. Robinson included IPG programming that was dismissed from the devotional programming category. SDC-R-001 at 4-5.

Dr. Robinson acknowledged that the omission of 126 SDC broadcasts was inadvertently due to the filter for devotional programming not identified by program type code "27". Tr. at 181-182. Further, IPG's Amended Direct Statement (IPG-D-001) was filed in January 2014, long prior to the Judges' Order of June 18, 2014 pursuant to which certain IPG-claimed programming was dismissed from the Devotional programming category. Consequently, Dr.

Robinson's recalculations omitting the dismissed IPG programming were conducted only following the June 18 Order, and the revised calculations were submitted as direct hearing exhibits. As appears on their face, IPG Exhibits IPG-D-005 through IPG-D-014 were Dr. Robinson's recalculated figures following the Judges' Order of June 18, 2014. Tr. at 106, 115, 119, 121, 123, 132, 135, 137, 146, 150, 162 (LR).

Dr. Robinson expressed that it was unlikely that the 126 broadcasts, which constitute two percent of the SDC broadcasts (and one percent of the total broadcasts), would have any economically material effect on the outcome of her findings. Tr. at 182-183. At the Judges' request, Dr. Robinson presented her recalculated figures reflecting the calculation of all indicia under four separate scenarios, which included/excluded the 126 SDC broadcasts and the broadcasts of the IPG dismissed programming. Dr. Robinson's calculations under each of the four scenarios were admitted into evidence as IPG-D-016.

B. DR. ROBINSON'S MEASUREMENT OF VOLUME AS AN INDICIA OF RELATIVE VALUE.

The SDC rebuttal brief criticizes Dr. Robinson's measurement of volume as an indicia of relative value. SDC-R-001 at 5. The SDC criticism does not acknowledge that Dr. Robinson's measurement of volume is not submitted as the single determinative measure of relative value in the absence of considering other indicia. Tr. at 164-166 (LR).

The SDC criticism further fails to appreciate that certain indicia measured by Dr. Robinson are not directly related to the broadcasts of IPG/SDC programming. Rather, they are comparisons of the characteristics of CSOs ordering the IPG/SDC programming. Tr. at 164-166 (LR). Ironically, the SDC rebuttal brief argues (and thereby concedes) the point that Dr. Robinson makes mathematically, i.e., that the "homogenous" nature of IPG/SDC programming

is reflected in the makeup of CSOs ordering IPG/SDC programming. SDC-R-001 at 6. For example, at one point the SDC rebuttal brief refers to Dr. Robinson's comparison of "stations" carrying IPG/SDC programming, when Dr. Robinson's testimony refers to a comparison of CSO's carrying the respective stations. SDC-R-001 at 7-8. The SDC criticism embraces Dr. Robinson's argument, i.e., that there is no means by which to distinguish IPG and SDC programming based on the nature of CSOs carrying such programming. According to Dr. Robinson, such CSOs are spending comparable amounts to retransmit stations containing IPG programming as SDC programming. IPG-D-016.

The SDC rebuttal brief criticizes Dr. Robinson's measurement of certain indicia because of her use of "averages" instead of "totals", arguing that the removal of certain IPG programs increases the IPG value according such indicia. SDC-R-001 at 7-11. The SDC rebuttal brief ignores that the removal of any IPG program, while it might increase or decrease an "average" figure, would be offset by and necessarily reduce an IPG value on a different metric, the number and amount of IPG broadcasts. Tr. at 152, 170-171 (LR); Tr. at 1112-1114 (Erdem). The SDC rebuttal brief also ignores that Dr. Robinson calculated "total" fees generated, which Dr. Erdem challenged as irrelevant. Tr. at 1108 (Erdem).

C. DR. ROBINSON'S USE OF 1997 AND 1998 DAYPART VIEWING DATA, IN THE EVALUATION OF 1999 BROADCASTS.

The SDC rebuttal brief criticizes Dr. Robinson's use of 1997 and 1998 Nielsen data for her 1999 daypart viewing analysis. SDC-R-001 at 11-12. Dr. Robinson conducted her daypart viewing analysis by relying on 1997 and 1998 Nielsen distant viewing data produced by the MPAA in prior cable proceedings. Tr. at 184 (LR). According to Dr. Robinson, because the data is so aggregated, unless there were very large changes in the viewing patterns over the

course of the day, there would be no difference between quarter-hour daypart viewing patterns in 1999 than in 1997/1998. Tr. at 186 (LR). Dr. Robinson further confirmed via publicly available Nielsen Media Research publications (Nielsen Audience Report, 2010/2011) that there have been only trace changes in U.S. daypart viewing, even over the span of decades. According to the Nielsen Audience Report, 2010/2011, from 1995 to 2000 the only daypart viewing change was a movement of 1% of aggregate viewing in three categories. Tr. at 185-189 (LR); Tr. at 984-985 (RG). Despite IPG's production of such report to the SDC (Tr. at 986-987 (RG)), and despite the criticism of Dr. Robinson's daypart viewing analysis by SDC rebuttal witness Dr. Erdem, Dr. Erdem expressed no knowledge of such Nielsen report. Tr. at 1106 (Erdem).

Dr. Robinson indicated that as of the time of her analysis, she did not have access to 1999 Nielsen data. Tr. at 185-186 (LR). Moreover, the Nielsen data submitted by the SDC in these proceedings was lacking foundation as to all aspects thereof and, consequently, could not be considered a reliable and valid substitute for 1997/1998 Nielsen data in IPG's possession. *See supra*. Additionally, as an indicator of 1999 anticipated daypart viewing, the only data available to a CSO would be already-existing information, e.g., 1997/1998 data.

The SDC rebuttal brief additionally criticizes Dr. Robinson's daypart viewing analysis because it utilizes daypart viewing for all programming, not just IPG/SDC programming. The SDC criticism ignores that the purpose of the analysis is to assess the only viewership criteria that could have been known to CSOs at the time a stations was ordered for retransmission, i.e., aggregated daypart viewership, then apply such figures to IPG/SDC programming. Utilizing just IPG/SDC viewership figures, if available, would simply reflect after-the-fact viewership that could not have been known when a CSO orders a station for retransmission, and would be a restatement of the 1999 Nielsen data.

**D. THE SDC'S ATTEMPT TO INJECT THE SDC STUDY RESULTS AS A
PURPORTED "RECALCULATION" OF DR. ROBINSON'S FIGURES.**

As noted at the final hearing, pages 13-15 of the SDC rebuttal brief purports to recalculate Dr. Robinson's figures, even though it is a recomputation of Mr. Sanders' figures. Such portion of the SDC rebuttal brief is not therefore "rebuttal" testimony. Such portion of the brief simply re-asserts the same Nielsen viewership data upon which the SDC study relies (data not used by Dr. Robinson, and to which IPG maintained a standing objection), calculated against a different lineup of stations. Tr. at 178-180 (LR). For such reason, such portion of the SDC rebuttal brief (SDC-R-001) was excluded from evidence. Tr. at 1043-1051.

IV. THE REBUTTAL AGAINST THE SDC STUDY.

**A. THE SDC STUDY LACKS SUFFICIENT FOUNDATION TO BE CONSIDERED
OR, ALTERNATIVELY, NO WEIGHT CAN BE GIVEN TO SUCH STUDY**

**i. IPG'S PENDING MOTION IN LIMINE TO EXCLUDE THE SDC
STUDY.**

On August 26, 2014, IPG filed a Motion In Limine to exclude the "Devotional Household Devotional Reviewing Report" (i.e., the "SDC study"), and any information derived therefrom. The basis of such motion was the SDC's failure to retain and produce either all information underlying the SDC study, or the "merger information" demonstrating the processes followed in order to merge certain datasets into the produced results, as is required by 37 C.F.R. Section 351.10(e). At the commencement of the final hearing, the motion was argued by the parties. The Judges determined that it would take the matter under submission, electing to continue to receive the evidence that was the subject of the motion pending any determination on the motion. Tr. at 45.

**ii. THE SDC'S INABILITY AND FAILURE TO PRODUCE THE
"UNDERLYING DATA" OR THE "MERGER INFORMATION",
AND IPG'S INABILITY TO REPLICATE THE SDC STUDY.**

The SDC failed to retain and produce either (i) all information underlying the SDC study, or (ii) the "merger information" demonstrating the processes followed in order to merge certain datasets into the produced results, as is required by 37 C.F.R. Section 351.10(e). IPG-R-001 at 3-6. SDC witness Alan Whitt asserted that whatever data was produced to IPG was from electronic files discovered on an "inoperable hard drive that [he] had stored in his basement." Order of May 2, 2014, at p.5; Tr. at 419-420 (Whitt). Nevertheless, at no time has the SDC attempted to obtain from its ostensible sources (Nielsen or the MPAA) either (i) the information underlying the SDC study, or (ii) the "Merger Information" demonstrating the processes followed in order to merge certain datasets into the produced results. Tr. at 419-420, 428 (Whitt); Tr. at 591- 595 (Sanders). Even allowing the introduction of the SDC study into evidence, the SDC study lacks sufficient foundation to give it any weight.

In a prior proceeding to determine whether a discovery sanction would be levied against the SDC, it was expressly acknowledged by the SDC (and determined by the Judges) that Merger Information existed and was not produced to IPG, including sweeps period data, a sweeps period algorithm, a file that prepared the Tribune data for merger, a process to reconcile Nielsen and Tribune data, and another "quality control process" performed by Mr. Whitt. May 2, 2014 Order at pp. 4-5, 7-8.

Dr. Laura Robinson confirmed her testimony from the prior proceeding that with the files and information provided by the SDC in discovery, she was not able to replicate the processes required in order to produce the asserted results of the SDC study. IPG-R-001 at 3-6; Tr. at 755-756, 765-768 (LR). It was determined by the Judges in the prior proceeding that the SDC's

attempted replication of the Merger Information occurred months following both the discovery deadline and the deadline for filing amended direct statements. See May 2 Order at fn. 12. While the Judges ruled that SDC witness Erkan Erdem was able to approximate the SDC results, such approximation came from (i) the use of files and information not produced to IPG (see May 2 Order at p.8), (ii) the implementation of limitations and constructs intended to produce the same result as the Whitt results (May 2 Order at pp. 7-8), and (iii) the use of files produced to IPG but for which the data and information *underlying* such produced files was not produced and could not therefore be examined. IPG-R-001 at 24-26.

Consequently, the SDC study could not be replicated with the electronic files and information provided to IPG during discovery. IPG-R-001 at 3-6; Tr. at 755-756, 765-768 (LR). On such basis, Dr. Robinson concluded that Mr. Whitt's results, as presented in Exhibit 1 of his report entitled "Report of Household Viewing Hours from the 1999 MPAA Copyright Royalty Data Base Showing Cable Viewing Data for 1999," and John Sanders' conclusions reliant thereon, are not reliable. IPG-R-001 at 3-7 (LR).

The SDC study is lacking sufficient foundation to be given any weight in these proceedings, as it has not been subject to adequate scrutiny or review.

iii. THE SDC'S INABILITY TO PRODUCE A WITNESS CAPABLE OF CONFIRMING THE BASIC CONTENTS OF NIELSEN DATA IN ITS POSSESSION AND UPON WHICH IT PURPORTS TO HAVE RELIED.

The SDC has presented no witness with firsthand knowledge of the Nielsen data utilized by the SDC study, or the methodological processes utilized in connection with the Nielsen data. SDC witness Alan Whitt asserts that the SDC study relied, *inter alia*, (i) "on a sample of television stations selected by Marsha Kessler", and (ii) "household diaries of distant program

viewing for those programs from Nielsen's six 'sweep' months" (the "Nielsen data"). (SDC WDS, Whitt test. at 3; see also, May 2 Order at p.1). However, Mr. Whitt was unable to provide any details about such matters, including the method or basis for station sample selection, or any details regarding the Nielsen data. SDC witness John Sanders, while attesting to the validity of the SDC study results, testified that he had not reviewed the Nielsen data upon which the SDC study relied. Tr. at 616-621, 722 (Sanders).

**1. DISTANT vs. LOCAL DATA; DIARY vs. METER DATA;
REGRESSION ANALYSES; INTERPOLATIONS.**

In prior proceedings, Nielsen and the MPAA have entertained a wide variety of sampling methodologies, and methods of data collection. Selected stations for studies have in certain instances been taken from the list of highest subscriber counts, while in other instances a combination of highest subscriber counts then variations of sub-strata, etc. *Cf.* Final Determination, 2000-2003 cable proceedings (Phase II), 78 Fed. Reg. 64984 (Oct. 30, 2013) and *Distribution of 1998 and 1999 Cable Royalty Funds*, 69 Fed. Reg. 3606, 3613 (Jan. 26, 2004). Nielsen data commissioned by the MPAA has previously relied independently on Nielsen meter data or Nielsen diary data, and in other circumstances combinations of Nielsen meter and diary data. Tr. at 425-426 (Whitt). In some instances, regression analyses are employed to "non-sweeps" broadcasts, and in others they are not. *Cf.* Final Determination, 2000-2003 cable proceedings (Phase II), 78 Fed. Reg. 64984 (Oct. 30, 2013) and Final Determination, 1993-1997 cable proceedings (Phase II), 66 Fed. Reg. 66433 (Dec. 26, 2001). Regression analyses have been employed by the MPAA, as well as straight-line, forward, and backward interpolations, in order to attribute value to non-sweeps broadcasts or broadcasts otherwise attributed with "zero viewing" instances. *Id.*; Tr. at 664-667 (Sanders).

No witness was presented by the SDC to explain the Nielsen data utilized in the SDC study. No indication appears in the Nielsen data to indicate that it is “distant” viewing data, as opposed to some form of “local” viewing data. Mr. Whitt asserted that it was “distant” viewing data only because it said so on the label of the electronic file that was given to him. Tr. at 423-424 (Whitt). Mr. Sanders indicated that he had no firsthand knowledge of whether it was meter or diary data, or a mixture, and did not feel qualified to make such assessment. Tr. at 617-621 (Sanders). No indication appears in the Nielsen data to indicate whether it was based on Nielsen diaries, Nielsen meters, or a combination of the two forms of known data collection. No indication appears in the Nielsen data to indicate whether any form of regression analysis or interpolations were utilized.

Insufficient foundation exists to explain the basic contents of the Nielsen data on which the SDC study purports to rely.

2. STATIONS SELECTED FOR INCLUSION.

Alan Whitt is not an expert in statistics or sampling methodology capable of a station sample selection and, in any event does not assert that he selected the 123 stations appearing in the Nielsen data. Tr. at 417-422 (Whitt). Marsha Kessler is not an expert in statistics or sampling methodology capable of a station sample selection and, in any event, no evidence was presented that she selected the 123 stations appearing in the Nielsen data. John Sanders is not an expert in statistics or sampling methodology. Tr. at 665 (Sanders). The SDC proffered no explanation as to why the SDC study contains only 72 stations. Mr. Sanders presumed it was a culling down because it was limiting the sample to “the most important markets”, but did not definitively know why only 72 stations were in the Whitt sample. Tr. at 596-597, 722-723 (Sanders). According to Dr. Robinson, however, 78 of the 123 Nielsen data stations contained

devotional programming, thereby leaving unexplained the omission of six (6) stations containing devotional programming from the SDC study. IPG-R-015, row 4, column 2.

No information or data regarding the station sampling process was presented by the SDC. Notwithstanding, IPG demonstrated that in response to discovery requests for such documents, the SDC produced the oral and written testimony of Marsha Kessler from the 1998-1999 Phase I proceedings. IPG-D-015 (IPG-R-008). The only reference to station selection appears in the written testimony of Ms. Kessler, wherein there appears a list of the stations selected by Ms. Kessler for inclusion in the 1999 Phase I MPAA/Nielsen study. IPG-D-015 at pp. 230-233 (IPG-R-008); IPG-R-001 at 4. However, the stations identified by Ms. Kessler are significantly different than and largely mutually exclusive from those stations appearing in data produced by the SDC. IPG-R-008; IPG-R-009; IPG-R-001 at 4. That is, only 35 of the 72 stations for which station data appears in the electronic files produced by the SDC (and from which Mr. Whitt asserts to have relied for his results) find reference in the Kessler sample of stations. IPG-R-009. Therefore, Mr. Whitt's statement that the SDC-produced data was derived from a sample of stations selected by Marsha Kessler is inaccurate or, at minimum, without evidentiary foundation. Tr. at 764-765 (LR).

In order to make statistically valid inferences and generalizations from a sample there must be evidence that the sample is representative of the population from which it is drawn. Mr. Whitt has not provided evidence that the sample he used to generate his results is representative. Thus, Mr. Whitt cannot properly infer that the results for the 72 stations he analyzed will apply to stations that he did not analyze. For example, Mr. Whitt's sample suffers from selection bias through its exclusion of Canadian stations. Mr. Whitt provides no evidence as to why the 72 non-Canadian stations analyzed are representative of the Canadian stations. IPG-R-001 at 6.

Moreover, even assuming for the sake of argument that the stations appearing in the Nielsen data were selected by the MPAA's Ms. Kessler, an issue that has repeatedly arisen in prior cable distribution proceedings is whether the MPAA was "cherry picking" which stations to include in its study. As noted by the CRT as early as the 1989 proceedings:

"[I]n choosing the stations to be studied, it appears that some were excluded even though they met the objective threshold established by MPAA itself. While MPAA's witness was able to explain some exclusions, others could not be explained."

See 57 Fed.Reg. at 15300.

No differently, in the 1993-1997 proceedings, the MPAA's selection of stations left the CARP and Librarian confused. Despite asserting the existence of a strict criteria of selecting stations that had a minimum number of distant cable subscribers, the MPAA was revealed to have inexplicably deviated from such criteria. As noted by the Librarian:

"[W]e cannot determine from the record whether MPAA's failure to apply its 90,000 subscriber criteria was deliberate, or the result of oversight. What is clear is that MPAA's failure to apply its chosen selection criteria consistently further undermines our confidence in the accuracy of the results generated by its sample survey. *In the future, when presenting a methodological survey, MPAA needs to rigorously adhere to its announced standards and parameters for the survey.*"

See 66 Fed.Reg. 66433, 66450 (Dec. 26, 2001), Docket No. 2000-2 CARP CD 93-97 (emphasis added). In the instant proceedings, no standards and parameters are even asserted to exist, largely due to the SDC's absolute unfamiliarity with how the Nielsen data stations were selected.

Insufficient foundation exists to explain the means by which stations appearing in the SDC study were selected.

iv. THE SDC STUDY WAS NOT DESIGNED BY AN SDC WITNESS, NOR WAS THE "UNDERLYING DATA" OR THE "MERGER INFORMATION" REVIEWED BY SDC EXPERT WITNESS JOHN SANDERS. JOHN SANDERS LACKS SUFFICIENT INFORMATION TO OPINE ON THE SDC DATA.

The SDC study was not designed by either of the SDC direct case witnesses, Alan Whitt or John Sanders. No testimony was designated by the SDC that explains the Nielsen data upon which the SDC study relied. SDC witness Alan Whitt was not designated as an expert witness, and displayed no expertise in study design. Tr. at 417-422 (Whitt). SDC witness John Sanders, while attesting to the validity of the SDC study results, testified that he had not reviewed the Nielsen data upon which the SDC study relied and, in any event, is not an expert in statistics. Tr. at 616-621, 665, 722 (Sanders). John Sanders testified that he had not contacted either Nielsen or the MPAA regarding the Nielsen data upon which the SDC study relied. Tr. at 594-597 (Sanders).

Underlying the entirety of Mr. Sanders' opinion is his reliance on the Whitt report, which is the basis for Mr. Sanders' computations and conclusions. Mr. Sanders projects results for all stations and time periods ostensibly using "sweeps" period data from Mr. Whitt's unknown (and not produced) sample of 72 stations. Mr. Sanders' estimates are effectively the product of several degrees of projection. IPG understands from prior proceedings that the Nielsen data are projections not actual measured viewership. For example, Nielsen employees have testified that a measurement of "10,300" viewers might be the result of a single viewer in Los Angeles County, California. According Mr. Whitt, for his 72 station sample he relies on Nielsen data for six (6) "sweeps" periods of four weeks each. Mr. Sanders then uses the projected data for the 72 stations for the 24 "sweeps" weeks to infer viewership for the remaining 28 calendar weeks as well as for all other distantly-transmitted stations. IPG-R-001 at 6-7.

Mr. Sanders' conclusions about the relative market value of SDC and IPG programming rely on his generalization of Mr. Whitt's results for the unknown 72 stations to all other stations distantly broadcasting the claimants' programming. Mr. Sanders has not provided evidence that

this generalization is statistically valid. John Sanders' conclusions rely on the results of Mr. Whitt's computations, which are themselves based on unreliable data. Therefore, John Sanders' conclusions are not reliable. IPG-R-001 at 3-7 (LR).

Consequently, IPG and the SDC have no means of determining the method by which the stations on which the SDC study relies were selected, and no means to determine what Nielsen data was collected, how it was collected, the limitations on the data, the scope and meaning of the data, the possible alternatives that were employed, etc. IPG is unable to verify the bottom-line figures asserted to exist for the SDC study.

Insufficient foundation exists to explain the Nielsen data, and therefore the SDC study, and no weight should be accorded to any information reliant on or derived from the SDC study.

B. THE SDC STUDY INCORRECTLY ASSUMES THAT NIELSEN-MEASURED HOUSEHOLD VIEWING EQUATES TO THE MEASURE OF "VALUE" FOR ANY PROGRAM RETRANSMITTED BY A CABLE SYSTEM.

i. NO EVIDENCE EXISTS THAT VIEWING EQUATES TO INCREASED CABLE SYSTEM SUBSCRIBERSHIP.

SDC witness John Sanders has relied exclusively on viewership in order to measure relative value. A prior ruling of the Librarian of Congress, in Phase I of these 1998-1999 proceedings, held that household viewership is the "wrong thing" to measure for allocating cable retransmission royalties. Specifically, the Librarian held:

"The devaluation of the Nielsen study is a result of the Panel's consideration of the hypothetical marketplace. . . . [E]vidence that demonstrated how cable operators valued each program category was, in the Panel's view, the best evidence of marketplace value. . . . The Nielsen study was not useful *because it measured the wrong thing.*"

Distribution of 1998 and 1999 Cable Royalty Funds, 69 Fed. Reg. 3606, 3613 (Jan. 26, 2004) (emphasis added). Mr. Sanders did not consider the published decision in Phase I of these

proceedings in connection with the opinions rendered in his direct testimony. SDC-D-002 at 3-5 (Sanders).

In several prior proceedings, the Judges and predecessor Copyright Royalty Tribunal and CARP have determined that household viewing is not the measure of value. Rather, the “buyers” that are to be considered for purposes of cable distribution attribution of value are the cable system operators that select which broadcast stations are to be retransmitted on their cable system. *See* 75 Fed.Reg. 57063, 57066, 57069, 57070 (Sept. 17, 2010), Docket No. 2007-3 CRB CD 2004-2005 (“Moreover, that there are factors other than subscriber growth considerations which may also be at work in influencing the demand for distant signal stations, does not change our finding that the Bortz survey focuses on the appropriate buyer in the hypothetical market – i.e., the cable operator.”)(“In short, we find that the George Ford advertising approach offers no helpful insight into the relevant hypothetical market or into the behavior of the relevant buyer in that hypothetical market – i.e., the cable operator.”)

Mr. Sanders, the Nielsen data, and the SDC study do not discriminate between ratings. That is, viewership attributed to the 18-34 demographic is not distinguished from viewership by gender, age, ethnicity, etc., all of which are known to reflect different purchasing habits, and all of which would be relevant to a CSO. In prior proceedings, the MPAA has submitted a thesis that the MPAA viewer study reflects the “advertising value” of retransmitted programming. Despite evidence presented in the 1989 CRT cable proceedings that specific demographic ratings are what drive advertising values, the SDC still provides no demographic ratings data and fails to support its claim that viewership equates to subscribership other than by overly broad generalizations. The SDC’s argument for the use of ratings, i.e., ratings reflect value, would render the conclusion that 72% of all distant retransmitted broadcasts in the United States are

without any advertising value, and 49% of all distantly retransmitted programs are without any advertising value. IPG-R-010; IPG-R-011.

By computing only one estimate that is derived from viewership data, Mr. Sanders is assuming that viewer ratings for particular *titles* are the primary consideration of a cable system operator in determining which broadcast *stations* to retransmit. While Mr. Sanders does conduct an analysis that he claims supports his result, such analysis also relies on (different) viewership data. IPG-R-001 at 8 (LR); SDC WDS at 9-11 (Sanders).

Mr. Sanders *assumes* that higher program “viewing” equates to higher appeal to cable system operators, and therefore higher system subscribership. No consideration is given to the possibility that a particular broadcast, may garner lower viewership than a competing broadcast, but actually result in greater *aggregate* viewership for the cable system. Mr. Sanders had not considered the concept of “displacement”, which demonstrates that one broadcast, while generating high viewer ratings, might just be displacing viewer ratings that would otherwise exist for a different broadcast appearing on the same cable system, thus failing to increase the subscribership or revenue to that particular cable system. Tr. at 599-610, 734-739 (Sanders).

Even presuming the statistical validity of the Nielsen data upon which the SDC study relies, viewership of a program title as measured by the Nielsen ratings data produced do not provide a direct measure of the economic value of such program title to a CSO for various reasons including: (1) a CSO primarily benefits from attracting subscribers rather than viewers, (2) broadcasting a program title with more viewers than another program title will not necessarily increase the aggregate subscribership for the CSO (i.e., the “displacement” effect), (3) broadcasting a program title with fewer viewers than another program title may increase the aggregate subscribership for the CSO, and (4) the Nielsen ratings data produced by SDC do not

distinguish among viewers with different demographic characteristics, and such demographic characteristics influence the value of such viewers to the CSO. IPG-R-001 at 8 (LR); Tr. at 175 (LR). No evidence has been presented for the predicate upon which the SDC study relies, and prior attempts to draw such connection have repeatedly been rejected in Phase I proceedings. *See, e.g.*, 57 Fed.Reg. 15286, 15302-15304 (April 27, 1992), Docket No. CRT 91-2-89CD.

ii. ONLY “MARGINAL VIEWING” COULD RESULT IN INCREASED SUBSCRIBERSHIP, BUT IS NOT CALCULATED BY THE SDC STUDY.

As noted by Judge Strickler, and acknowledged by SDC witness John Sanders, assuming that viewership equates to subscribership, it would only equate to the extent that there was a marginal increase in the viewership for the entire cable system. Tr. at 734-739 (Sanders). Prior Phase I decisions have come to the same conclusion. *See generally*, Distribution of 2004 and 2005 Cable Royalty Funds, 75 Fed. Reg. 57063 (Sept. 17, 2010). John Sanders acknowledged that a program or program lineup could displace viewership of persons already subscribing to a cable system. Tr. at 788-791 (Sanders).

John Sanders further acknowledged that a CSOs decisionmaking would be based on the viewership ratings for an entire station lineup, but that the SDC study engages in no such analysis, and instead looks at ratings only for individual programs. Tr. at 603-606 (Sanders). Assigning a value to a particular program in a station lineup is fundamentally different than assigning a value to a station’s entire lineup. Tr. at 741 (Sanders).

The SDC study engages in no analysis of either “marginal” increases in viewership based on the selection of programming, nor the analysis of viewership ratings for an entire station lineup as opposed to individual programs. The Judges inquired regarding the use of a Shapley analysis, to which SDC witness Dr. Erdem opined that he believed that such data, measuring the

marginal benefit of each retransmitted station to each CSO, does not exist. Tr. at 1084-1085 (Erdem).

iii. ONLY VIEWING KNOWN IN ADVANCE OF A CABLE SYSTEM OPERATOR'S DECISION TO RETRANSMIT A STATION COULD AFFECT A CSO'S DECISIONMAKING, BUT IS NOT CONSIDERED BY THE SDC STUDY.

As observed by the Judges, at the time that a CSO determines to retransmit a particular station, the viewership ratings for a particular program are not known. For such reason, and presuming a causal relationship between viewer ratings and subscribership, a better indicator of ratings in a particular year would be the ratings for prior years. The Nielsen data information relied on by the SDC study would not exist until after the retransmitted station's broadcasts had aired, i.e., after a CSO had already elected to retransmit the station. Tr. at 689-695 (Sanders).

The SDC study engages in no analysis of viewership ratings for programs on a historical basis.

C. THE SDC STUDY, AS PURPORTED, DEPENDS UPON STATISTICALLY UNRELIABLE DATA, UNSUBSTANTIATED PROJECTIONS OF HOUSEHOLD VIEWING, AND AN INADEQUATE NUMBER OF MEASURED BROADCASTS.

i. THE SDC STUDY, AS PURPORTED, DOES NOT MEASURE VIEWERS BUT "PROJECTS" VIEWERSHIP.

According to the SDC, Nielsen provided distant viewing data for six "sweeps" periods. As has been revealed in several prior proceedings, the Nielsen distant viewing data is not a reflection of the actual measured viewing, but is rather "projected" viewing. Tr. at 696 (Sanders). Notwithstanding, IPG cannot discern such distinction from the electronic files produced by the SDC, as data underlying the Nielsen data was never produced in this proceeding. Nor did the SDC present a witness with firsthand familiarity with the Nielsen data.

Consequently, and by contrast to prior proceedings, IPG was precluded from analyzing the number of persons actually measured as viewing particular programs in order to demonstrate the vastly limited information upon which the Nielsen data relies for its distant viewing data.

ii. THE SDC STUDY, AS PURPORTED, ONLY MEASURES 1999 “SWEEPS” BROADCASTS FOR 24 OF 52 WEEKS, ON DATA FOR ONLY 72 STATIONS, THEN EXPERIENCES EXTRAORDINARILY HIGH AND ERRATIC INSTANCES OF “ZERO VIEWING”.

Despite IPG’s identification of 45,507 quarter hours of IPG and SDC retransmitted broadcasts (IPG-D-012), the SDC study relies on the (questionable) viewership measurements in the Nielsen data of only 666 quarter hour broadcasts - - 273 IPG-claimed broadcasts and 393 SDC-claimed broadcasts. Tr. at 179, 795-796 (LR).

The Nielsen data upon which the SDC study relies takes no measurements of non-sweeps period broadcasts, i.e., broadcasts occurring in more than half of the 1999 calendar year (28 of 52 weeks). Tr. at 453 (Whitt). Broadcast data from only 72 stations is considered. Then, of the data that is considered, the viewership measurements experience extraordinarily high instances of “zero viewing”, erratically affecting broadcasts on certain stations but not others, and providing aggregate zero value to 49% of the unique program titles. (see *infra*)

D. THE SDC VIEWER STUDY IS STATISTICALLY FLAWED AND WITHOUT ANY RATIONAL JUSTIFICATION BECAUSE OF THE PREVALENCE OF “ZERO VIEWING”.

i. “Zero” Viewer Analysis of Nielsen Quarter Hour Data for All Measured Broadcasts, Devotional Broadcasts, IPG and SDC.

The SDC study purports to rely on the Nielsen data for six “sweeps” periods, which data affects the value accorded to each and every broadcast under the SDC study. Approximately 2.2 Million quarter-hour broadcasts were measured by the Nielsen data. When IPG began to study

the Nielsen data that is ostensibly utilized as the measure of distant viewing, IPG discovered that in the column marked “wght_house_proj” i.e. the number of distant households *projected* to be tuned to a station during a specific quarter hour during the sweeps periods, there was a disproportionately large number of “0” entries. Since IPG had received the Nielsen data electronically, IPG was able to tabulate the number of entries in which viewership to programs was projected to be “0.”

For 72% of all broadcasts measured during 1999 in the Nielsen data, and for 91.2% of all devotional program broadcasts, Nielsen recorded “0” for the number of households projected to be watching a station outside the local FCC footprint area. IPG-R-010. Notwithstanding, SDC-claimed programs only reflect 79.1% zero viewing, while IPG-claimed programs reflect 91.2% zero viewing. IPG-R-001 at 11, 18-20; IPG-R-013; IPG-R-014. No different than in the 2000-2003 cable proceedings, the “zero” viewing percentages vary significantly from station to station among the stations included as part of the Nielsen data. While every single station in the MPAA viewer study has a significant percentage of quarter hours with no recorded viewing, the stations fall in a widely divergent range. *Id.* Accepting a previously posed explanation that “zero viewing” does not mean that no one is watching, “zero viewing” levels should be uniform amongst IPG, SDC, and other program owners, however such levels are not uniform.

No SDC witness testified as to their familiarity with the Nielsen data upon which the SDC study relied. Nielsen employee Paul Lindstrom has previously testified that a “zero viewing” instance *does not* mean that no one is watching. Final Determination, 1993-1997 cable proceedings (Phase II), 66 Fed. Reg. 66433, 6649 (Dec. 26, 2001). By contrast, both SDC witnesses John Sanders and Erken Erdem testified that such measurement *does* reflect that no one is watching. Tr. at 519-520, 523 (Sanders); Tr. at 1053-1054, 1069 (Erdem). Without

addressing the prevalence and disparity of “zero viewing”, Dr. Erdem summarily concludes that the “zero viewing” levels establish that few people are watching any distantly retransmitted programming, i.e., that no one is watching 72% of all retransmitted broadcasts, and even fewer are watching IPG programming, in 92% of all such retransmitted broadcasts. Tr. at 1071 (Erdem).

ii. The SDC has made no attempt to reduce or account for the high and disparate levels of “Zero Viewing”.

In the 2000-2003 (Phase II) proceedings, Dr. Gray testified that he had reduced the “zero viewing” to less than one percent by means of regression analyses. In these proceedings, no such computations were employed, and the only SDC witness to address the “zero viewing” issue was John Sanders. Mr. Sanders testified that “zero viewing” was not problematic, however, Mr. Sanders also indicated that he had not reviewed the Nielsen data. Tr. at 616-621, 722 (Sanders).

Mr. Sanders does not account for the overall high incidence of zero-viewing broadcasts in his testimony or for the asymmetry of such observations in the SDC and IPG data, nor was he qualified to opine on such matter. Tr. at 665 (Sanders). In the 2000-2003 (Phase I) proceedings the Judges determined that:

“the Nielsen data are not without problems. The sample size is not sufficient to estimate low levels of viewership as accurately as a larger sample. Mr. Lindstrom acknowledged that ‘[t]he relative error on any given quarter-hour for any given station . . . would be very high, 6/3/13 Tr. at 303 (Lindstrom)—an acknowledgment echoed by Dr. Gray. 6/4/13 Tr. at 518-19 (Gray) (agreeing that, with samples of 10,000 households, there is a high relative error rate for each quarter-hour ‘point estimate’).”

Docket no. 2008-2 CRB CD 2000-2003 (Phase II), Final Distribution Order (Aug. 13, 2013) at 35-36. Dr. Robinson further affirmed that she was unable to perform calculations on the standard error of the Nielsen data because the standard error figures were not provided. Tr. at 797-799 (LR). Notwithstanding, it was her recollection that Paul Lindstrom of Nielsen had

testified that the standard error appearing in the Nielsen data would be very large. Id. SDC witness Dr. Erdem testified that the lack of a specified standard error is troubling, but could have been calculated by Nielsen and produced by the SDC. Tr. at 1068, 1097-1098 (Erdem).

In the 2000-2003 (Phase II) proceedings, the Judges also observed, “Furthermore, Mr. Lindstrom acknowledged that he had not produced the margins of error or the levels of confidence associated with the Nielsen viewership data, despite the fact that such information could be produced. [cite omitted]. Without this information, the reliability of any statistical sample cannot be assessed...The Judges infer that, had such information underscored the reliability of the Nielsen data, it would have been produced by MPAA.” Id. at 36.

A high incidence of zero-viewing broadcasts is problematic when basing any conclusions on an aggregation of multiple samples as the SDC has done. Each of the viewership observations in the Nielsen data used by Mr. Whitt and Mr. Sanders includes a single point estimate projection of the number of viewers of the given station at the given time. However, these projections are based on a much smaller sample of surveyed viewers. If a different sample of the population of viewers for a given station at a given time had been taken, the observed number of viewers may have been different. Because the projections in the Nielsen data are based on surveys and not the full population of viewers, then each projection has a “standard error” associated with it. The standard error is an indicator on the reliability of the mean that is based on the observed survey results, the sample size, and the size of the population of viewers. Dr. Robinson was unable to calculate the increase in the standard error of the sum because the standard errors of each rating observations was not included in the data produced by SDC, even though he SDC acknowledged it could have been. IPG-R-001 at 9-11; Tr. at 1097-1098 (Erdem).

The SDC and Nielsen are aware of the high levels of “zero viewing” in the Nielsen data. In the 1997 cable proceedings, it was revealed that the Nielsen data reflected 73% “zero viewing”, and the Librarian appropriately focused extensively on the fact that there was no explanation provided for this evident issue. *See* 66 Fed. Reg. 66433, at 66449-66450 (Dec. 26, 2001), Docket No. 2000-2 CARP CD 93-97. In 76% to 82% of all broadcasts measured from 2000-2003 in the Nielsen diary data, Nielsen recorded “0” for the number of households projected to be watching a station outside the local FCC footprint area. According to the Librarian, which cited the 1997 CARP determinations *verbatim*:

“We conclude that of the eight deficiencies we have noted in the MPAA’s distribution [methodology], this “zero” viewing hours deficiency is, by far, the most egregious. The evidence offered by MPAA to explain this perceived deficiency in its methodology was less than enlightening. Mr. Lindstrom, who is not a statistician, clarified that attribution of “zero” viewing does not mean that no persons were watching, only that no diaries recorded viewing, and that any suggestion to the Panel that no viewing occurred would reflect a misunderstanding of the data. But then he stated that the “zero” viewing hour information consists of pieces of data that are imprecise; that they are among a series of estimates that may be either high or low; that such individual quarter hour entries have little usefulness; but that they aggregate up to an accurate result, and “the more imprecise bricks you throw in the pile, the more accurate the overall number is going to be.”

Accepting this and other testimony of Mr. Lindstrom at face value, we find that it does not even begin to explain the enormous discrepancies described above regarding the crediting of “zero viewing hours. There is little if any evidence in this record that these high credits of “zero” viewing hours were offset in 1997 by credits of excessively high units of viewing hours. Thus, we are left with a record that more than merely suggests that the MPAA methodology is significantly defective in the manner in which it credits “zero” viewing hours.”

Id. at 66449-66450.

Among the extensive comments provided by the Librarian, the Librarian concluded:

“In the future, if [a party] continues to present a Nielsen-based viewer methodology, it needs to present convincing evidence, backed by testimony of a statistical expert, that demonstrates the causes for the large amounts of zero viewing and explains in detail the effect of the zero viewing on the reliability of

the results of the survey. In addition, [a party] needs to take steps to improve the measurement of broadcasts in the survey to reduce the number of zero viewing hours, thereby increasing the reliability of its study.”

Id. at 66450.

Contrary to the edict of the Librarian, the levels of “zero viewing” have not been reduced in any significant manner, even though the use of such Nielsen data required parties to take steps to “reduce the number of zero viewing hours”.

iii. “Zero Viewing” Analysis on a Program Title by Station Basis.

Zero viewing also varies widely for the same program title across all stations in the Nielsen data on which it is broadcast. To measure this variation in zero viewing, Dr. Robinson identified all unique station-program title combinations in the Tribune Media data during the sweeps periods covered by the Nielsen data. For each station-program title combination, Dr. Robinson calculated the percentage of broadcasts with zero viewing for the entire broadcast, and called this percentage “Station Zero Share.” If Program A was broadcast 5 times on station X, and 3 of those broadcasts had zero viewers for the duration of the broadcast, then the Station Zero Share is 60% for that station-program title combination. IPG-R-001 at 21-22.

For each program title that is broadcast on multiple stations in the Nielsen data, Dr. Robinson calculated the standard deviation of the program’s Station Zero Shares. This standard deviation (with a minimum value of zero and a maximum value of 1) is a measure of the variation in zero viewing for the program across the stations on which it was broadcast. If this standard deviation is close to zero for a given program, then the incidence of zero viewing for the program is fairly consistent across all stations in the sample. A higher standard deviation indicates higher variation in the incidence of zero viewing across the stations in the sample on which the program is broadcast. If the incidence of zero-viewing varies widely across the

stations in the sample, then that would suggest a high error rate in the viewership projection (including a high error rate for the zero viewership projections in the data). IPG-R-015 presents the results of this analysis of the variation in zero viewing for the same program title across stations. IPG-R-001 at 21-22; IPG-R-015.

IPG-R-015 shows that there are 8,289 unique program titles on 123 stations in the TV and Nielsen data used by the SDC, with 35,658 unique combinations of program titles and stations. The next panel of results in IPG-R-015 shows that many program title-station combinations have zero viewing for *every* broadcast, given that the median Station Zero Share across all combinations of program titles and stations is 100% in the first column. IPG-R-015 shows substantial variation in zero-viewing for the same program across all stations.

The bottom panel of results in IPG-R-015 (“Station Zero Share Standard Deviation by Program”) shows the variation in Station Zero Shares for individual programs. The first column shows that there are 4,075 program titles that were broadcast on multiple stations in the sample of 123 stations in the Nielsen data. For each of these 4,075 program titles, Dr. Robinson calculated the standard deviation of the given title’s Station Zero Shares. The bottom panel of IPG-R-015 shows the summary statistics for these 4,075 standard deviations. The mean of the standard deviations is 23.1%, indicating significant variation.

iv. “Zero Viewing” on a Program-by-Program basis.

In the 2000-2003 (Phase II) proceedings the Judges indicated that it would be instructive to conduct an analysis at the program title level in order to determine the validity of the Nielsen data: “This distinction is critical, because, under the hypothetical market construct, royalties would accrue on a program-by-program basis to individual copyright owners, not to the distantly

retransmitted stations.” Docket no. 2008-2 CRB CD 2000-2003 (Phase II), Final Distribution Order (Aug. 13, 2013) at 34-35.

Analysis at the program title level shows that many program titles in the Nielsen data have aggregate zero-viewing. IPG-R-011 analyzes the zero-viewing by title and shows that **49%** of the 8,289 unique program titles in the Tribune Media data that were broadcast on the 123 stations in the Nielsen data had zero viewing for *every broadcast*. In other words, the Nielsen data indicate that zero households viewed approximately half of all program titles over the entirety of the sample period. IPG-R-012 shows two examples: program titles *Alfred Hitchcock Presents* and *Today’s Homeowner*. The Nielsen data shows that all 126 broadcasts of *Alfred Hitchcock Presents* from the Tribune Media data had zero viewing on the three stations on which it was broadcast in the Nielsen data. The data also shows that all 72 broadcasts of *Today’s Homeowner* had zero viewing on the four stations on which it was broadcast in the Nielsen data. IPG-R-001 at 12; IPG-R-011; IPG-R-012. Over one hundred broadcasts of the “Oprah Winfrey Show” were attributed with zero viewing. Tr. at 828-829 (LR).

IPG-R-011 also examines the zero-viewing statistics for the 72 stations in the Whitt sample and shows that the zero-viewing results are similar to those for the 123 stations in the Nielsen data. For example, it shows that 52% of the 4,723 unique program titles in the TV Data that were broadcast on Whitt’s 72 stations had zero viewing for *every broadcast*. IPG-R-001 at 16; IPG-R-011.

IPG-R-013 and IPG-R-014 examine the particular titles at issue in this proceeding for the 72 stations considered by Mr. Sanders. IPG-R-014 is identical to IPG-R-013, except the results are grouped by programs with similar program titles, whereas IPG-R-013 shows results for each program title as reported in the Whitt and Sanders testimony. The analysis shows the incidence

of zero-viewing in the data used by Mr. Sanders for each program title claimed by SDC and IPG. For example, IPG-R-014 shows that 652 of 705 broadcasts of IPG's program "Benny Hinn" had zero viewing in the Nielsen data. Further, IPG-R-014 shows that the incidence of zero-viewing data points is higher for IPG broadcasts than for SDC broadcasts. In particular it shows approximately two-thirds of the 4,305 zero viewing instances are attributed to IPG and one-third to the SDC. The data indicate that 2,820 or 91% of IPG broadcasts had zero-viewing compared with 1,485 or 79% of SDC broadcasts. Based on Pearson's chi-squared test, the difference between 91% and 79% is statistically significant at the 99.9% confidence level. IPG-R-001 at 16-17; IPG-R-013; IPG-R-014.

Mr. Sanders' relative market value conclusions also seem to be inconsistent with other computations from his data. IPG-R-014 shows that Mr. Sanders' own data indicates that IPG has 62% of the broadcasts (3,093 compared with the SDC's 1,878 broadcasts) and IPG has 49% of the broadcast quarter-hours (6,188 compared with the SDC's 6,474 broadcast quarter-hours). Yet, Mr. Sanders estimates that 18.5% of the relative market value is attributable to IPG and 81.5% to SDC. In order to come to his relative market value conclusions, Mr. Sanders relies on flawed household viewing data wherein (i) the data are sampled from a population in which 49% of all titles have zero-viewing for *every broadcast* of such title, (ii) a substantial majority, 87%, of all broadcast observations used in his computation of the 18.5%/81.5% relative market value share indicate zero-viewing (4,305 of 4,971 of broadcast observations), and (iii) 66% or 2,820 of those zero-viewing instances are attributed to IPG. Mr. Sanders' relative market value conclusion is that any broadcast of any IPG-claimed program has less than one-third of the value of any SDC-claimed program. IPG-R-001 at 21; IPG-R-014.

- v. The SDC has offered no qualified witness for its summary conclusion that the "zero viewing" percentages are not problematic.**

SDC witness John Sanders was not presented as an expert in the field of statistics or economics, and expressly asserted that he was not such an expert. Tr. at 665 (Sanders). Notwithstanding, Mr. Sanders opined that the high and disparate instances of “zero viewing” in the Nielsen data were not problematic. Tr. at 522-523, 652-654 (Sanders). Mr. Sanders was not qualified to make such assessment, and the SDC has presented no witnesses capable of opining on such subject.

The existence of “zero viewing” has been addressed in two prior proceedings. In the 1997 cable proceedings (Phase II), the only witness presented to address “zero viewing” was Paul Lindstrom, an employee of Nielsen. The CARP and the Librarian held in the 1997 proceedings that Mr. Lindstrom “is not a statistician”, and that his explanation therefore “does not even begin to explain the enormous discrepancies . . . regarding the crediting of “zero viewing” hours. 66 Fed. Reg. 66433, at 66449-66450 (Dec. 26, 2001), Docket No. 2000-2 CARP CD 93-97. In the 2000-2003 cable proceedings (Phase II), Dr. Jeffrey Gray was presented to address the “zero viewing” issue, but noted that his regression analyses had reduced such “zero viewing” to “less than one percent”. See generally, Final Determination, 2000-2003 cable proceedings (Phase II), 78 Fed. Reg. 64984 (Oct. 30, 2013).

No qualified SDC witness has been presented to address the significance and effect of “zero viewing” within the 1999 Nielsen data, or its effect on the SDC study.

vi. The corruption of a necessary and significant element of the SDC study corrupts any results derived from the SDC study.

The SDC study purports to rely on only one indicia of measurement, distant viewership figures appearing in the Nielsen data, i.e., data that was found on an “inoperable hard drive that [Alan Whitt] had stored in his basement” (Tr. at 419-420 (Whitt)), and for which no witness was

presented to confirm or explain its contents. According to the SDC, the reported viewing from the Nielsen data for any given broadcast during the six “sweeps” months dictates the value that the SDC study has accorded to such broadcasts, while no measurement or value is accorded to broadcasts occurring during the six non-sweeps months for which no distant viewing data exists.

The prevalence of “zero viewing” demonstrates that the Nielsen measurements (whether diary or meter) are too few in number to obtain an accurate read of distant viewing, a conclusion that reflects the unreliability of the Nielsen data for purposes of the SDC study. These distortions go to the heart of the SDC study, rendering it unreliable. IPG-R-001 at 3-4. The “zero viewing” instances are so prevalent and disparately apparent as to render the Nielsen data invalid and corrupted. As the sole indicia of measurement utilized by the SDC study, the results of the SDC study are consequently invalid and corrupted.

E. THE SDC COULD HAVE IMPROVED ITS DATA WITH REGRESSION ANALYSIS, INTERPOLATIONS, AND OTHER MEANS UTILIZED IN PRIOR PROCEEDINGS IN ORDER TO ATTRIBUTE VALUE TO NON-SWEEPS BROADCASTS AND BROADCASTS WITH “ZERO VIEWING” INSTANCES.

In prior proceedings, regression analyses have been employed by the MPAA against the Nielsen distant diary data, as well as straight-line, forward, and backward interpolations, in order to attribute value to non-sweeps broadcasts or broadcasts otherwise attributed with “zero viewing” instances. *Cf.* Final Determination, 2000-2003 cable proceedings (Phase II), 78 Fed. Reg. 64984 (Oct. 30, 2013) and Final Determination, 1993-1997 cable proceedings (Phase II), 66 Fed. Reg. 66433 (Dec. 26, 2001); Tr. at 664-667 (Sanders). When queried as to why the SDC did not engage in such analysis in order to attribute value to non-sweeps broadcasts or broadcasts otherwise attributed with “zero viewing” instances, Mr. Sanders acknowledged that the SDC could have engaged in such analysis with the data already available. Tr. at 721-722 (Sanders).

SDC witness John Sanders was not presented as an expert in the field of statistics or economics, and expressly asserted that he was not such an expert. Tr. at 665 (Sanders). Mr. Sanders was apparently unfamiliar with the fact that regression analysis, and straight-line, forward, and backward interpolations, have been used in the absence of any comparison with Nielsen local ratings data, utilizing only the Nielsen distant diary data. See generally, Final Determination, 1993-1997 cable proceedings (Phase II), 66 Fed. Reg. 66433 (Dec. 26, 2001).

The Nielsen “sweeps” data, by itself, allowed for the engagement of regression analysis or interpolations in order to attribute value to non-sweeps broadcasts, and without the use of any other forms of data. No witness was presented by the SDC that was an expert in statistics, capable of engaging in regression analysis or interpolations. No witness was presented by the SDC capable of explaining why the SDC did not engage in regression analysis or interpolations in order to attribute value to the non-sweeps broadcasts, even in the absence of Nielsen local ratings data.

The SDC could have engaged in regression analysis or interpolations in order to attribute value to the non-sweeps broadcasts, even in the absence of Nielsen local ratings data.

F. THE SDC’S ASSERTED CORRELATION BETWEEN “LOCAL” AND “DISTANT” VIEWING IS BASED ON ONLY A HANDFUL OF DEVOTIONAL PROGRAMS AND THEIR “LOCAL” RATINGS FOR FOUR WEEKS IN FEBRUARY 1999, PURPORTS TO PROJECT THE CORRELATION TO THOUSANDS OF PROGRAMS AND MILLIONS OF BROADCASTS APPEARING IN THE NIELSEN DATA, AND DEMONSTRATES THAT IPG PROGRAMMING HAS A RELATIVE VALUE SIGNIFICANTLY HIGHER THAN ITS DISTANT RATINGS.

Mr. Sanders purports to undertake a comparison of the relative shares of IPG and SDC programs within a Nielsen local ratings database and the Nielsen (distant) data upon which the SDC study is based. Only a handful of devotional programs are considered as part of the

comparison, the correlation of which are the basis of Mr. Sanders' conclusion that Nielsen local ratings data sufficiently reflects distant viewing for all programs appearing in the Nielsen data. According to Mr. Sanders' analysis, a perfect correlation of February 1999 local ratings data and distant ratings data for a single program would suffice to establish that the local ratings for thousands of programs and millions of broadcasts is perfectly correlated to Nielsen distant ratings. SDC WDS at 9-11 (Sanders).

Mr. Sanders did not reveal in his written testimony that his comparison of distant data with local ratings data was based solely on the local "sweeps" data for only one month, February 1999, which fact was first acknowledged during Mr. Sanders' oral testimony. SDC WDS at 9-11 (Sanders); Tr. at 595 (Sanders). In any event, according to Dr. Robinson the relative viewership in the February local ratings data is significantly different than the relative viewership in the distant viewing data, from a statistical standpoint, and therefor undermines Mr. Sanders' conclusions. IPG-R-001 at 24-26.

IPG-R-016 was prepared by Dr. Robinson and is based on Mr. Sanders' Appendix F, which shows the number of viewers for SDC and IPG titles in both the February 1999 local viewing data and the 1999 "sweeps" distant viewing data analyzed by Mr. Sanders. As IPG-R-016 shows, IPG's relative viewership share in the local ratings data is 28.7%, whereas IPG's share in the distant viewing data is 23.0%. The difference between these shares is statistically significant at the 99.9% confidence level. That is, IPG's relative viewership share when using the local ratings data is statistically significantly *greater* than its relative viewership share when using the distant viewing data upon which Mr. Sanders bases his conclusions. If Mr. Sanders alleges that the local ratings data "confirms" his results, then the local ratings data must also

“confirm” that IPG’s relative viewership share may be statistically significantly greater than his estimate. IPG-R-001 at 24-26; IPG-R-016.

G. THE SDC STUDY, AS PURPORTED, RELIES ON A STATISTICALLY INADEQUATE NUMBER OF STATIONS, THEREBY UNNECESSARILY EXCLUDING ENTITLED BROADCASTS FROM COMPENSATION IN THESE PROCEEDINGS.

In the 1983 cable distribution proceedings, the MPAA “conceded within its proposed findings that the sample of 117 stations cannot be perfectly projected to other stations,” and the CRT found that the MPAA study of 117 stations out of 622 (18.8%) was inadequate for the purpose of sampling in these distribution proceedings. 51 Fed. Reg. 12792, 12794 (April 15, 1986), Docket No. CRT 84-1 83CD. “During 1983, there were 622 U.S. broadcast television stations which were carried on a distant signal basis by at least one cable system.” 51 Fed.Reg. at 12794.

SDC witness Alan Whitt asserts that the SDC study relied, *inter alia*, on “household diaries of distant program viewing for those programs from Nielsen’s six ‘sweep’ months” (i.e., the “Nielsen data”). SDC WDS, Whitt test. at 3; see also, May 2 Order at p.1. The Nielsen data produced by the SDC contained 123 stations. Tr. at 763-764 (LR); IPG-R-008. During 1999, there were approximately 700 Form 3 distantly retransmitted stations (commercial and non-commercial). Tr. at 978-979 (RG). Consequently, the Nielsen data upon which the SDC study relied sampled only 17.5% of the Form 3 distantly retransmitted stations, a lower percentage than was previously deemed inadequate for purpose of sampling in these distribution proceedings.

As a matter of law from prior rulings, the Nielsen data, and therefore the SDC study, “cannot be perfectly projected to other stations,” and is inadequate for the purpose of sampling in these distribution proceedings.

H. THE 1999 SDC STUDY, EVEN AS PURPORTED, IS INFERIOR IN STATED DESIGN TO THE MPAA VIEWER STUDY THAT WAS ALREADY FOUND UNRELIABLE IN THE 1997 CABLE DISTRIBUTION PROCEEDINGS.

Accepting for the sake of argument that the SDC study is of the design asserted by the SDC, it is inferior to the MPAA study found unreliable in the 1997 cable distribution proceedings (Phase II). *See* Final Determination, 1993-1997 cable proceedings (Phase II), 66 Fed. Reg. 66433 (Dec. 26, 2001).²

As set forth in the Final Determination for the 1997 cable proceedings, the MPAA relied on Nielsen distant ratings data comparable to that which the SDC asserts is Nielsen data relied on as part of the SDC study. Notwithstanding, the 1997 MPAA study thereafter engaged in forward, backward, and straight line interpolations in order to attribute value to non-sweeps broadcasts, a process of which the SDC did not engage. *Id.*

Despite the MPAA's efforts to increase the validity of its calculations, the 1997 MPAA study was nonetheless found to be sufficiently unreliable as to warrant no award based on such study. *Id.* The 1999 SDC study provides no modifications or improvements to the Nielsen data, effectively only summing its projected viewership numbers.

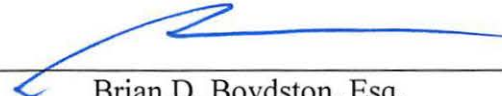
As a matter of law, the 1999 SDC study must be considered inferior to the 1997 MPAA study that was already found unreliable, and therefore be deemed unreliable itself.

² Although the determination in such matter was subsequently vacated, it was subject to the caveat that it "should not be construed as a repudiation of the reasoning in the December 26, 2001 Recommendation and Order." 69 Fed. Reg. 23821 (Apr. 30 2004).

CERTIFICATE OF SERVICE

I hereby certify that on this 23 day of September, 2014, a copy of the foregoing was sent by ^vovernight mail to the parties listed on the attached Service List.

email and



Brian D. Boydston, Esq.

SETTLING DEVOTIONAL CLAIMANTS:

Clifford M. Harrington
Mathew MacLean
Victoria N. Lynch
Pillsbury, Winthrop, et al.
P.O. Box 57197
Washington, D.C. 20036-9997